Petition

No. 81-709

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In the Supreme Court of the United States

OCTOBER TERM, 1981

OLIVER W. PICKETTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a criminal case where the prosecutor is already prepared, on evidence theretofore presented to the grand jury, to recommend indictment for repeated acts of bribery, and where petitioner, whose formal education has extended to the ninth grade, expresses reliance on the same prosecutor's pre-grand jury appearance explanation of his rights, may the grand jury then, through that prosecutor, compel the attendance of the petitioner and ask him to affirm or deny the solicitation or receipt of bribe moneys by himself, the answers to which questions, if given, must incriminate him? Were not his denials "induced by governmental tactics or procedures so inherently unfair . . . as to constitute a prosecution for perjury a violation of the due process clause of the Fifth Amendment"?[1]

2. In that criminal case, where petitioner's accusers had long before made their accusations before the Grand Jury upon which the later indictment was founded, and were never recalled in face of petitioner's denials of those accusations, is it not plain that the grand jury has exceeded its powers, in calling upon petitioner to answer "to a capital or other serious crime" before indictment, in violation of the first clause of the Fifth Amendment?

3. When put to trial under the foregoing circumstances, and the only evidence is the accusations of the alleged victims, and the denials of the defendant as revealed by the transcript of his testimony, does that satisfy

a. The burden of proof, after a plea of not guilty, that material false statements had been made before a duly constituted tribunal, because "Defendants [sic] did not

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[1] *United States* v. *Mandujano*, 425 U.S. 564, 585 (1976).

challenge at trial the legality of the grand jury and have, accordingly, raised no issue as to its legality"? (App. B, p. 13).

b. The burden of proof that the petitioner was under oath by way of a transcript recitation that he answered "having been first duly sworn"?

c. Of more significant importance, may the unsworn unilateral statement of a prosecutor, made out of court subject neither to confrontation nor cross-examination, be accepted consistent with Rules 602 and 603 of the Federal Rules of Evidence, that the matters inquired into were under investigation by the grand jury, and that the questions asked were material to that investigation?

d. Does Count I of the indictment, which was never introduced as evidence, through a competent witness or otherwise, supply the "proof" of area of grand jury investigation and relevancy of questioning to that investigation on appeal; and particularly since neither the trial court, nor the government, ever made such reliance, and the defense was never given opportunity to address the issue?

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner Oliver W. Picketts, Defendant-Appellant in the Court below, respectfully pray that a Writ of Certiorari issue, to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion and decision of the United States District Court for the Northern District of Illinois made post-jury trial on the pre-trial Motions to Dismiss Count II and for

Judgment of Acquittal after Verdict is not officially reported, but is reproduced in the Appendix hereto (Appendix A).

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the conviction of your Petitioner on Count II of a two-count indictment is not yet officially reported, but is reproduced in the Appendix hereto (Appendix B).

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was filed on August 6, 1981 (Appendix B). A Petition for Rehearing, timely made, was denied on September 17, 1981 (Appendix C). This Petition is filed within thirty days thereof. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

I. *The Fifth Amendment*:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS

Title 18 U.S.C. §1623:

> "(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or

ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made,

the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub.L. 94-550, § 6, Oct. 18, 1976, 90 Stat. 2535."

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 29:

"(a) *Motion before Submission to Jury.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) *Motion after Discharge of Jury.* If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

As amended Feb. 28, 1966, eff. July 1, 1966."

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 602:

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses."

Rule 603:

"Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

LIST OF PARTIES TO THE PROCEEDING

The caption of this case in this Court contains the names of all parties.

STATEMENT OF THE CASE

In the consideration of this case, some background of the petitioner is appropriate. He was born in Meadville, Mississippi, where he was educated at the Cleveland County Training School, completing the ninth grade. This was the extent of his formal education. He moved to Chicago, Illinois, in 1952 and has lived there since, with the exception of two years in the service, during which two years he took correspondence courses (Tr. 357). His further education was in the electrical field at Coyne Electrical School (a trade school in Chicago). He has worked as an electrician since that time (Tr. 358-361), having received his A card in 1963 from Local 134 (International Brotherhood of Electrical Workers), generally working a day and a night job (Tr. 358-361). He began employment as an electrical supervisor with the Chicago Housing Authority (CHA) on October 16, 1969 (Tr. 360), which employment continued until his conviction in this cause.

On February 21, 1980, your petitioner was charged in a two-count indictment. Count One alleged that Picketts engaged in a pattern of racketeering by soliciting and accepting money from CHA electricians in return for his recommendation that they were qualified to receive full union membership status. (Title 18 U.S.C. §1962(c)). Count Two alleged that Picketts, under oath, made material declarations before a grand jury, which he then knew to be false, in violation of 18 U.S.C. §1623. (Appendix B, p. 10).

The United States District Court had jurisdiction to try these charges of violation of federal criminal laws pursuant to Article III, section 2 of the Constitution.

The facts necessary to consideration of this Petition begin before that indictment. Both Counts I and II concerned six CHA electricians, all of whom (except one, who

also did not testify at trial) testified before the grand jury on February 8 or May 10, 1979 and never appeared before the grand jury after May 10, 1979 (Stipulation, Doc. 36).

On May 21, 1979, your Petitioner was interviewed at the Office of the United States Attorney by, among others, Assistant United States Attorney Scott Lassar, and was advised that six persons who were under his [Picketts'] supervision at the CHA, had already provided information indicating that your Petitioner forced them to pay for a letter from him, as their foreman electrician, to the union (Local 134, Brotherhood of Electrical Workers) that would entitle them to a Class B card.[2] Your Petitioner denied he had ever taken money from any CHA employee under any circumstances, except one not pertinent to this case. At that May 21st meeting, your Petitioner was repeatedly asked why six employees under his supervision would claim he had required them to pay him under the conditions above stated. Your Petitioner persisted in his denials. (Stipulation, Doc. 36).

In that same Stipulation, it was agreed that Assistant United States Attorney Scott Lassar would have, prior to May 31, 1979, on the basis of the grand jury testimony already had, recommended that the United States Attorney's Office seek an indictment against your Petitioner for extorting the six CHA employees under the provisions of Title 18 U.S.C. §1962(c). (Stipulation, Doc. 36).

Some days prior to May 31, 1979, an agent of the Federal Bureau of Investigation asked your Petitioner if he would voluntarily come and appear before the grand jury. He declined. A subpoena, which Assistant United States

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[2] States erroneously as "License" in indictment.

Attorney Lassar caused the grand jury to issue, was served upon him at his place of employment (Stipulation, Doc. 36).

Pursuant to said subpoena, he appeared before the January 1979 Grand Jury, and persisted in his denials that he had solicited moneys from CHA employees, including the six named in the indictment. (Stipulation, Doc. 36).

Before his substantive testimony began, however, the Transcript reflects the following:

OLIVER WENDELL PICKETTS

having been first duly sworn by the Foreman to testify the truth, and whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. LASSAR:

Q. Would you state your name, please, and spell your last name for the record?

A. Oliver Wendell Picketts, P-i-c-k-e-t-t-s.

Q. Mr. Picketts, before we proceed, I would like to advise you of certain matters.

You are appearing today before the Special January 1979 Grand Jury, which is investigating allegations that electricians of the Chicago Housing Authority have paid you money, in connection with their job.

The possible violations of the criminal law of the United States that are being investigated by this Grand Jury include Title 18, United States Code, Section 1951, which is the statute dealing with extortion. And there are other possible violations of federal criminal law.

You are a subject of this investigation, and you can be named as a defendant in that indictment, if one is voted, arising out of this investigation.

Do you understand that?

A. Sure, yes.

Q. Before you are asked any questions, I want to inform you of your constitutional rights.

Under the Fifth Amendment to the United States Constitution you have the right not to answer any question if you believe your answer to that question would tend to incriminate you. Do you understand that?

A. Yes, I understand that.

Q. If you answer any questions, the answers which you give may be used against you in a court of law, or other proceedings. Do you understand that?

A. Yes, I understand that.

Q. If you decide to answer questions asked of you, you may also thereafter stop answering at any time, and invoke your privilege against self-incrimination, as I have already explained to you. Do you understand that?

A. Yes, I understand that.

Q. Also, Mr. Picketts, under the Fifth Amendment, you have a right not to present any documents which are your own personal documents. Do you understand that?

A. Yes, I understand that.

Q. And in your rights under the Sixth Amendment, you have the right to consult with an attorney of your choice before answering any questions here today. Further, although an attorney cannot accompany you into the Grand Jury room, because its proceedings are secret, your attorney can be present outside the Grand Jury room, and you may leave the Grand Jury room at any time to confer with an attorney before answering any questions. Do you understand that?

A. I understand that.

Q. Are you represented by an attorney today?

A. No.

Q. Have you consulted with an attorney before coming here, regarding your rights?

A. Not consulting with an attorney, as far as my rights are concerned, because I think you explained that to me when I was here before.

Q. Have you talked to an attorney about the investigation?

A. Yes, I talked to one about the investigation.

Q. I take it that you do not, then, have an attorney here today?

A. No, I don't.

Q. Do you understand that if you were unable to afford an attorney, one could be appointed for you prior to your answering any questions today, or at any time during the questioning, if you feel that you wish to consult with an attorney; do you understand that?

A. Yes, I do.

Q. And lastly, Mr. Picketts, you are testifying under oath today, and you have sworn to tell the truth. If you lie to the Grand Jury; that is, if you make a knowing misstatement of a material fact to the Grand Jury, you could be charged with a crime. Do you understand that?

A. I understand that, sure.

Q. Do you understand all your rights as I have explained them to you?

A. I understand everything that you have explained to me.

Q. And after being advised of your rights, do you still wish to answer questions, and testify?

After inquiry about his CHA job, and union procedures in obtaining a card from it, petitioner was questioned about obtaining money from electricians working under him. Typical of the questioning as respects the persons named as victims in the indictment, and who had already testified before the grand jury, was William Denman:

"Q. Do you know an electrician named William Denman?

"A. Yes, I do.

"Q. Have you ever been given any money for any reason by William Denman?

"A. No, I haven't.

"Q. Have you ever asked William Denman for any money?

"A. No." (All quotes re grand jury appearance, Government's Exhibit 2).

On February 21, 1980, your Petitioner was indicted charging him as aforesaid.

The case proceeded to trial, and, so far as is pertinent to Count II, consisted of the transcript of the petitioner's grand jury appearance and testimony,[3] the testimony of five of the six indictment-named CHA employees, who reasserted that they had given your Petitioner moneys in connection with their jobs there, or in connection with their B card recommendations, and Petitioner's denials, plus his character witnesses and nine other CHA employees,[4] whom he supervised, and who testified Petitioner had never solicited or received any monies from them.

On motion under Rule 29 of the Federal Rules of Criminal Procedure, petitioner was acquitted on Count I at the close of the government's evidence. At the close of all evidence and after a verdict of guilty on Count II, a similar motion under said Rule was made.

After trial, a hearing was had, pursuant to agreement, on defendant's pre-trial motion to dismiss Count II for grand jury abuse for violation of the first clause of the Fifth Amendment as well as the Rule 29 Motion for Acquittal after Verdict.

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[3] The accuracy of the transcript was stipulated by the defense.

[4] The defense was limited to those other persons about whom Petitioner was inquired as reflected in the grand jury transcript.

The trial court found the evidence sufficient to satisfy the requirements of law stating "It was not, let's say, an open and shut matter to decide. I have had some difficulty in my reasoning on it. But that was the conclusion I did reach." (Tr. Sept. 22, 1980, pp. 2-3). The trial court found the authority of the tribunal did not have to be proved; that the oath was satisfied by the reporter's recital in the transcript that Oliver Picketts was "on oath duly sworn;" and that the matters under investigation by the grand jury, and the materiality of the declaration of the Petitioner were satisfied by the recital by the prosecutor, above. (Exhibit A). He found the Miranda warning given the Petitioner satisfied due process in respect of his grand jury testimony.

In affirming Petitioner's conviction on Count II, the Court of Appeals decided that "Defendants did not challenge at trial the legality of the grand jury and, accordingly, have raised no issue as to its legality." (Appendix B, p. 13); that "it would be better practice for someone present at the grand jury proceedings to testify to the giving of an oath, we find that the transcript of defendant's grand jury testimony was sufficient to prove that he testified under oath." (Appendix B, p. 14); that "From the indictment handed down by the grand jury on the substantive count and the grand jury transcript admitted into evidence, it was proved clearly that the grand jury was investigating whether defendant Picketts solicited and accepted money from CHA electricians," (Appendix B, p. 12-13) and "the government introduced the grand jury transcript at trial. The transcript shows that immediately prior to the questioning of Picketts, he was advised by the prosecutor that the grand jury was investigating whether Picketts had solicited and received money from CHA electricians. The Count I indictment demonstrates

further that these solicitations and payments were the subject of the grand jury investigation." (Appendix B, p. 14).

As to Petitioner's contention, based on the first clause of the Fifth Amendment, that his being brought before the grand jury patently to affirm or deny the prior accusations of witnesses that he unlawfully solicited and received money was an abuse of power, the Court of Appeals found "no merit," relying on this Court's decision in *United States* v. *Mandujano*, 424 U.S. 565 (1976) and other cases, which sanction grand jury interrogation of a putative defendant in their given circumstances. (Appendix B, p. 17-18).

REASONS FOR GRANTING THE WRIT

We respectfully request this Court grant its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on the following grounds:

1. This decision of the Court of Appeals has simply deemed the authority given under *United States* v. *Mandujano,* 424 U.S. 564 (1976) as a *carte blanche* to call any putative defendant before a grand jury, whatever the circumstances of his being called, and that any protest on this account is mooted by that decision. It is apparent to us that the specially expansive concurring opinions, particularly those of Messrs. Justice Brennan and Marshall, as well as the more terse qualifications of Messrs. Justice Stewart and Blackmun that such absolution was not intended.

Here we have the situation the qualifications avoided; an unscholared putative defendant, called involuntarily before a grand jury, to affirm or deny the accusations made against him.

It is clear that if he affirms, he confesses to that which the prosecutor has already determined on as sufficient to recommend a "request" to the grand jury it indict. It is also clear that if he denies, a second count for perjury or "false declarations" is a boost to prosecution on the substantive count, or, at least, a back-up to the record if it can't be made substantively, as it could not in this case.

The Court will recognize that the Petitioner advised the prosecutor repeatedly about the accusations made against him, which were the foundation of Count I, on which he was acquitted, and was steadfast in his denials.

It is of singularly prominent importance that in *Mandujano,* the grand jury testimony was *not* introduced on the basic charge on which *Mandujano* was tried, and concerning which it is contended he gave false testimony. Both concurrences remarked on the forbearance in this regard (See 425 U.S. at pp. 607-8, 9). It was introduced here in the trial of the §1962 charge. Proceeding from the premise that at least four Justices of this Court were relieved in *Mandujano* that in Texas the prosecution had the discretion not to introduce his grand jury testimony at the trial "on the charge concerning which he was questioned" (425 U.S. at p. 608), the concurrence of Messrs. Justice Stewart and Blackmun concluded "this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process: (425 U.S. at p. 609), citing as an example *Brown* v. *United States,* 245 F.2d 549 (8th Cir. 1957). This case is *Brown.*[5]

This Court should issue its Writ of Certiorari because the court below has misapplied this Court's decision in *United States* v. *Mandujano,* 425 U.S. 565 (1976) and is

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[5] "The court is of the opinion that the evidence in this case clearly established that Mr. Newcomb's purpose was simply to do what he did, viz., to extract from defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1950, knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury. He knew how each of the parties to that talk, including defendant, remembered it because each had made his sworn statement to investigator Strain, and three of the parties to the talk had already given their recollection of it to the grand jury before Newcomb called defendant. Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." (245 F.2d 549 at p. 555).

in direct conflict with the Eighth Circuit decision in *Brown* v. *United States*, 245 F.2d 549 (1957).

2. This case presents an important question of federal law, which, to our knowledge, has never been settled by this Court, but now should be. As now sanctioned by the decision of the court below, any putative defendant may be brought before the grand jury to answer to the charges made against him, and, thus, be deprived of his Fifth and Sixth Amendment guarantees. This is the occasion requiring the "more discriminating analysis," where the public right to every man's evidence "must yield" because of the "vast potential for abuse in the absence of further safeguards to preserve the policies underlying our adversary system." (425 U.S. at pp. 593, 594).

This case presents an unhappy picture of the putative defendant, under judicial compulsion relying upon the definition of his rights as they have been explained to him by an antagonistic prosecutor, who is asked to affirm or deny the charges already made by his accusors. This is not the situation where "a government may ordinarily assume that its compulsory processes are not eliciting testimony that he deems to be incriminating,"[6] these are not "apparently innocent disclosures sought." Rather an admission convicts without trial; a denial manufactures another count for false swearing.

We submit to the Court that the government does in these circumstances make the grand jury its agent (415 U.S. at p. 595), and if we adhere to the concept of independence of the grand jury, it exceeds its jurisdiction. We urge to this Court, as we did to the courts below, that

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[6] 425 U.S. at p. 592, quoting from *Garner* v. *United States*, 317 U.S. at 439-440.

the power of the grand jury is circumscribed by the first clause of the Fifth Amendment, that no person shall be called upon to answer except upon indictment. The grand jury had neither right nor authority to call upon your Petitioner to affirm or deny charges that earlier witnesses made against him, and to embarrass his defense on trial, when he persisted in his denials.

In this respect, a further distinction must be made from *Mandujano*. In that case, a special grand jury was investigating illicit drug traffic in the San Antonio area; a narcotic sale by Mandujano had aborted, and the investigatory file on him was closed. While the interrogation had a potential to incriminate him, that was not its focus. The inquiry with which we are here concerned was clearly directed at Oliver Wendell Picketts; and him alone.

The procedure condoned here, under the purported authority of *Mandujano* repeals the first clause of the Fifth Amendment, and subverts the protections afforded an accused by the Sixth.

3. Consistent with the pre-indictment deprivations, the trial itself was a far departure from the accepted, indeed mandated, and unusual course of judicial proceedings, which was, in turn, sanctioned by the Court of Appeals, and the Court of Appeals itself deviated from that course. We urge the Court that this is a case properly calling for exercise of this Court's power of supervision.

The decision of the Court of Appeals is extraordinary in several aspects, but the basically most confounding is the ease it now affords a prosecutor in proving a violation of the false declaration statute (Title 18 U.S.C. §1623(a)), which statute requires a showing of:

1. A competent tribunal (Court or grand jury);
2. Knowledge;
3. A false declaration made under oath;
4. A showing that the declaration was material to the matters under investigation by the grand jury.

This decision holds that all elements may be proved by:

1. Testimony of witnesses that a defendant did something or somethings;

2. The transcript of the defendant's testimony simply denying that he did that something or those somethings.

We submit that the concept proposed by this decision eradicates the reasonable doubt standard in some elements, and ironically allows the defendant to be convicted of false swearing on the basis of non-sworn "evidence." The irony exists principally in that this convicting "evidence" could never be the subject of perjury or false swearing.

The essential elements of proof of the area of investigation by the grand jury and the materiality of the questions was based on the unsworn statements of the prosecutor before the grand jury (as disclosed by the grand jury minutes), which were imprimatures as valid evidence *long after* the defenses had rested and guilt had been pronounced. We refer to the introduction by the prosecutor when he gave the petitioner his impression of the area of grand jury investigation (See p. 8 *supra*). This statement was not made in court; it was not sworn; there was no confrontation; there was perforce no cross-examination. It was espoused only after, pursuant to a Rule 29 motion, the defense pointed to the lapse in proof. Not

sworn, it violates Rule 603 of the Federal Rules of Evidence. As representing the independent area of investigation by the grand jury, of which the prosecutor was not a part, he was precluded from "testifying" without competent evidence demonstrating his personal knowledge under Rule 602.

The Court of Appeals sanctioned this holding by the trial court, but apparently had doubts about its validity. It, therefore, attempted to bolster proof on these two essential elements by relying in its decision on the allegations of Count I of the indictment (see Exhibit B, pp. 4, 5). The decision of the Court of Appeals raised this basis for evidentiary sufficiency for the first time, and even though the indictment was never proposed as evidence at the trial.

The fact that the government did not so rely, and the trial court made no such reliance (See Exhibit A, pp. 10-11), we submit, precludes the Court of Appeals from reliance thereon (See *Chiarella* v. *United States*, 100 S.Ct. 1008, 1118-9 (1980)) except in extraordinary circumstances not present here (Cf. *United States* v. *Aulet*, 618 F.2d 182, 186 (2d Cir., 1980)). A court simply cannot raise for the first time and simultaneously rule on a new point. *Kanelos* v. *Kettler*, 406 F.2d 951, 954 fn. 15 (C.A.D.C., 1968).

We, therefore, submit the "indictment basis for materiality" was improper to the Court of Appeals' decision, and deprived petitioner of appellate due process.

The dispensing of the necessity of the government's proving its charge pervaded virtually every essential element. The petitioner's contention that he was not shown by evidence that he was under oath, the decision finds that a grand jury transcript that he was "first duly sworn on oath, testified . . ." is sufficient. (Appendix B, p. 14). The Court of Appeals thus reduced its own standard estab-

lished in *United States* v. *Devitt*, 499 F.2d 135 (7th Cir., 1974) that such a transcript, *plus* the affirmative testimony of a proper witness that was present at the taking of the oath, was sufficient. It considers *now* that, in this case, it would be "better practice" to have had a sworn witness to the taking of the oath. We submit it is impossible to reconcile established legal principles of reasonable doubt on an essential element with the ambiance that accepts the transcript recitation as indicative that it is more probable that an event did happen than it did not.

The opinion recognizes a point petitioner made that "(1) no evidence exists that the grand jury was duly impaneled and sworn;" (Appendix B, p. 11). Having recognized the point as an essential element to conviction, the Court of Appeals held: "Defendants [sic] did not challenge at trial the legality of the grand jury and have, accordingly, raised no issue as to its legality". (Appendix B, p. 13). We urge this Court that it is proper to remind the Courts below, under its supervisory power, that a "not guilty" plea puts every essential element into issue, and that a burden of disproof is never to devolve upon an accused.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the opinion of that Court entered in this cause.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN
Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

United States of America	)	
v.	)	No. 80 CR 131
	)	Judge Thomas R. McMillen
Oliver W. Picketts	)	

DECISION

Pre-trial and post-trial motions relating to Count II of the Indictment in this case have been briefed, and the court has had an opportunity to review the law and the documents involved. Count II charged defendant with violation of 18 U.S.C. § 1623, false testimony before the Special January 1979 Grand Jury. Defendant's pre-trial motion to dismiss Count II was filed beyond the date set for pretrial motions and therefore was not fully briefed before trial.

The motion to dismiss Count II is based primarily upon the contention that defendant was subpoenaed to appear before the grand jury after the accusatory witnesses had already testified against him and after the United States Attorney would have recommended that an indictment be sought from the grand jury for the matters charged in Count I (violation of 18 U.S.C. § 1962(c)). Defendant contends that this procedure, detailed in a stipulation of facts filed July 17, 1980, constitutes prosecutorial abuse, violates the defendant's rights under the Fifth Amendment of the United States Constitution, and in other ways exceeds the powers of the grand jury. The claim of prosecutorial abuse seems to be based essentially on the possibility that defen-

dant was entrapped, although this specific point is not argued by defendant.

We find and conclude that the procedure followed by the United States Attorney and by the grand jury in this case is supported by *United States* v. *Mandujano,* 425 U.S. 564, 583 (1976). That case and *United States* v. *Dionisio,* 410 U.S. 1, f.n.8 (1973) justify calling a suspect to testify before the grand jury. Justice Brennan in his concurring opinion in *Mandujano,* advised that an intentional and intelligent waiver of the Fifth Amendment should be made by the suspect (425 U.S. 598-99), and the transcript of Mr. Picketts' testimony in this case shows that this admonition was fully complied with (Transcript, attached to government's memorandum filed July 29, 1980). Furthermore, the defendant had been interviewed by the prosecutor and was told that six persons had already testified against him before the grand jury. He was not misled or entrapped.

Defendant relies upon *Jones* v. *United States,* 342 F.2d 863 (D.C. Cir. *en banc* 1964). It will be noted that only four of the eleven judges joined in Part III of the lead opinion in that case and four specifically disagreed with this part. In any event, we can give no weight to *Jones* in view of the later decisions by the United States Supreme Court, cited above.

Therefore, there can be little doubt that the grand jury had the "power" to call defendant as a witness. In the absence of entrapment, the law seems to be that the prosecutor can call any witness who may have information on the matter under investigation. However, if calling the defendant served no purpose except to subject the defendant to an indictment for false testimony, we would consider this an abuse of the power.

The prosecutor's brief advances several justifications for calling the defendant as a witness, none of which are entirely dispositive.* He should have known that defendant would either invoke the Fifth Amendment, which could not be used by the grand jury as a basis for indicting him, or that he would continue to deny any wrongdoing, unless he recanted his previous statement. However, his denial could have constituted evidence that the previous witnesses had committed perjury. On the other hand, had he changed his mind and decided to testify fully, perhaps after having obtained a grant of immunity, it is entirely possible that the grand jury's investigation would have continued and led to indictments against other electrical department employees. This justification was sufficient in *United States* v. *Devitt*, 499 F.2d 135, 140 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

These latter alternatives are frankly speculative, the more reasonable expectation being that the defendant would either take the Fifth Amendment or would perjure himself when called before the grand jury. However, defendant has not advanced any evidence of the prosecution's motivation for calling the defendant to the grand jury, and there were arguable justifications for doing so. Our Court of Appeals has discouraged attempting to evaluate the prosecutor's state of mind, in the absence of actual entrapment. It has stated in *United States* v. *Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974), *cert. denied*, 426 U.S. 911 (1976):

> . . . Since the questions were material to the grand jury's investigation, we doubt that we can inquire into

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* The prosecutor's reasons for calling defendant as a witness before the grand jury are not contained in the stipulation and therefore cannot be relied on by defendant.

> the motivation for asking them. . . . But even if the questions were asked with the expectation of perjured answers, defendant cannot complain. This is not an entrapment case. . . . It was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not "so outrageous" as to bar prosecution. . . . To the extent that *United States* v. *Mandujano*, 496 F.2d 1050 (5th Cir. 1974) . . . [is] *contra*, we respectfully disagree.

Turning to the post-trial motions filed August 8, 1980, the motion for judgment of acquittal is based upon several alleged failures of proof, first that there was no evidence that the defendant was "under oath in any proceedings before [a] grand jury" as required by 18 U.S.C. § 1623. The transcript of the proceedings involving defendant on May 31, 1979 recites at page 2, however: "Oliver Wendell Picketts having been first duly sworn by the foreman to testify the truth, the whole truth, and nothing but the truth was examined and testified as follows:." Defendant stipulated that he testified before the grand jury "as reflected in government's exhibit 2," the transcript. We have never seen a transcript in which the court reporter transcribed the actual words used by himself or by the foreman of the grand jury in swearing a witness. We find that the foregoing quoted certification of the court reporter that Mr. Picketts was duly sworn is sufficient to support the jury's verdict in this respect. *United States* v. *Devitt*, *supra*, p. 4.

The second point in the motion for judgment of acquittal is that the government did not adduce evidence that the Special January 1979 Grand Jury "was sitting as a duly impaneled and sworn grand jury" on May 31, 1979. Referring again to the stipulation of facts filed July 17, 1980,

we note that it does not specifically cover the impanelling or swearing of the grand jury, but the defendant does stipulate that the grand jury heard several witnesses prior to May 31, 1979 and that on May 31, 1979 defendant "appeared before the January 1979 Grand Jury and testified as reflected in government's exhibit 2." Government Exhibit 2, the transcript, contains an unsworn statement by the prosecutor, made at the time of defendant's testimony, that the Special January 1979 Grand Jury was investigating alleged violations of 18 U.S.C. § 1951 and other statutes. This was followed by the return of an indictment by this grand jury against the defendant on February 21, 1980, signed by the foreperson and reciting in paragraph 1 of Count II that "the Special January 1979 Grand Jury was sitting as a duly impanelled and sworn grand jury." We believe this document, which constitutes an official court record, speaks for itself and is part of the record of this case, without further authentication by any eyewitness.* This conclusion is somewhat fortified by the stipulation of July 17, 1980 entered into by the defendant and his attorneys shortly before trial which repeatedly referred to various proceedings by that particular grand jury, without any contest concerning its impanelling or being sworn. The prosecution was justified in relying on these representations in not offering evidence of impanelling or being sworn. The prosecution was justified in relying on these representations in not offering evidence of impanelling or swearing.

Defendant relies primarily upon *United States* v. *Reinecke*, 524 F.2d 435 (D.C. Cir. 1975), and the government cites no authority to support its contention. We believe *Reinecke*, while persuasive, presents a somewhat different

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* cf. Federal Rules of Evidence § 803(8).

problem. In that case, the alleged perjury was committed before a Senate committee" consisting of one senator, convened pursuant to a quorum rule which had not been published as required by statute. The proceeding was completely invalid, and there was no evidence or court document to the contrary. In the case at bar, there is not only evidence as contained in paragraph 1 of Count II, an official document, but there is also a presumption of regularity and at least an inference of waiver by the defendant's stipulation. We find and conclude that there was sufficient evidence to support the jury's verdict on this point, without giving any weight to the prosecutor's unsworn statement in the transcript of the grand jury.

Thirdly, defendant contends that there was no sworn evidence supporting the allegations of paragraphs 2 and 3 of Count II. These paragraphs allege preliminary matters, firstly that the grand jury was investigating whether the defendant was violating 18 U.S.C. § 1962 and secondly that it was material to the investigation for the grand jury to know whether he had solicited or accepted money from electricians in connection with their employment at the Chicago Housing Authority. The latter point involves a question of law on which no evidence was necessary and upon which the jury was not instructed. The first point is likewise not a matter of substance with respect to the guilt or innocence of the defendant. It is merely a recitation of the function being performed on May 31, 1979 by the grand jury and is not a necessary element in proving the defendant's perjury.

We do not agree with the government's answer to this particular point, to the effect that the grand jury transcript constitutes "an admission" by Picketts but prefer to rest our ruling on the foregoing legal basis. We believe that the court can take notice of the matters contained in the

transcript of the grand jury proceedings which are in evidence in deciding the issue of materiality but do not believe that the matter is one which requires a decision from the jury based upon competent evidence.

Defendant's fourth point in its motion for acquittal is that there was insufficient evidence that the Chicago Housing Authority was "involved" in commerce. Defendant's memorandum filed August 8, 1980 accurately summarizes the testimony of the chief government witness on commerce, William Brekke (pp. 4-5). Defendant also calls attention to the fact that § 1962 requires "activities . . . which affect . . . interstate or foreign commerce." We assume that a minimal affect on commerce satisfies § 1962 as it does for § 1951, and the testimony of William Brekke certainly satisfies this requirement. *United States* v. *DeMet,* 486 F.2d 816 (7th Cir. 1973).

The last point is that the evidence did not satisfy the "two witness rule." We ruled against the defendant upon the latter point prior to trial and on the interstate commerce point during trial. We see no reason to change these rulings and find the government's responses contained in its Answer filed August 15, 1980 to be persuasive.

Turning to the motion in arrest of judgment on Count II, defendant contends that this count fails to charge a crime under 18 U.S.C. § 1623. Neither party has referred to this motion in the memoranda. Our reading of it does not show any constitutional flaw in the indictment, but defendant is apparently contending that the charge does not satisfy the requirements of 18 U.S.C. § 1623. We find and conclude that the indictment on its face does allege a crime under that section and that the prosecutor correctly relied upon it in obtaining the indictment. Whether an indictment could also have been obtained for violation of § 1621 is beside the point.

We also reject the defendant's argument that § 1623, when read in conjunction with 28 U.S.C. § 1746, applies only to written declarations signed under oath. This would restrict § 1623 to merely written "false declarations," which would be a very narrowly-restricted offense indeed. We find no such intention on the part of Congress and believe that § 1623 has been properly invoked in the case at bar.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's motions to dismiss Count II of the indictment, for judgment of acquittal n.o.v., and for an arrest of judgment are denied.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: Sept. 22, 1980

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 80-2418

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OLIVER W. PICKETTS,

Defendant-Appellant.

Appeal from the United States Court for the Northern District of Illinois, Eastern Division.
No. 80-CR-131—Thomas R. McMillen, *Judge.*

Argued March 31, 1981—Decided August 6, 1981

Before FAIRCHILD, SPRECHER and WOOD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Defendant-appellant Oliver W. Picketts appeals from his sentence upon conviction for violation of 18 U.S.C. § 1623, for making a false declaration before a grand jury. Picketts asserts that there was insufficient evidence to sustain the conviction, that the charge constituted an abuse of the grand jury and violated his Fifth Amendment rights, and that the trial court erred in approving an instruction regarding a good character defense. Picketts received a two-year suspended sentence and was placed on probation for two years including eight months at a work release program. We affirm.

On February 21, 1980, the defendant Oliver W. Picketts was charged in a two-count indictment. Count One alleged that Picketts, an electrician foreman at the Chicago Housing Authority (CHA), engaged in a pattern of racketeering by soliciting and accepting money from CHA electricians in return for his recommendation that they were qualified to receive full union membership status. Count Two alleged that Picketts, under oath, made material declarations before a grand jury, which he then knew to be false, in violation of 18 U.S.C. § 1623.[1] Jury trial lasted from July 8-11, 1980. On July 10, 1980, the trial court granted defendant's motion for judgment of acquittal as to Count One because of a defect in the indictment.[2]

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[1] 18 U.S.C. § 1623(a) provides as follows:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] The Count One indictment was flawed in two respects. As to all the electricians other than Washington, the alleged solicitations and payments were all made more than five years before the date of the indictment and thus were outside the statute of limitations. Washington testified that he did not seek to receive a B License [The proper reference would be to a "B Card."] but rather that he paid $100 to Picketts because Washington understood that was the price he had to pay for three months employment at the CHA. The court reasoned that if the Count One language about obtaining a B Card was stricken as superfluous, then Picketts was accused merely of soliciting and accepting money from Washington, which does not constitute criminal activity.

The indictment on Count Two specified as false declarations that Picketts stated that he had never solicited or received money from any electricians in connection with their jobs; it further specified that as to six named CHA electricians (William Denman; James Thompson, Jr.; McKinley Madgett; Nathaniel Myart; Sam McClellan; and Kenneth L. Washington) Picketts had denied that he ever accepted or received any money from any of them in connection with their jobs. The Count Two indictment charged that Picketts knew these declarations to be false when made because he knew that he had solicited and accepted money as described in paragraph four of Count One of the indictment. That paragraph charged, in pertinent part, that the defendant knowingly solicited and accepted money from electricians employed by the Chicago Housing Authority in return for the defendant's recommendation that the electricians receive a B License from Local 134 of the International Brotherhood of Electrical Workers, according to the following table:

Electrician	Approximate Amount of Money	Year
James Thompson, Jr.	$500	1970
William Denman	500	1971
McKinley Madgett	700	1972
Nathaniel Myart	800	1973 and 1974
Sam McClellan	900	1974
Kenneth L. Washington	100	1975

Regarding the sufficiency of the evidence, the defense makes several arguments, which we will consider: (1) no evidence exists in the record to show that the grand jury was duly impaneled and sworn; (2) no evidence exists in the record to show that the subject of the grand jury investigation was whether defendant Picketts was soliciting

and accepting money from CHA electricians; (3) no evidence exists in the record of the materiality of the false declarations made by Picketts; (4) there is no proof in the record of Picketts being sworn when he appeared before the grand jury; (5) because the indictment charged that Picketts solicited and accepted money for a B License, when in fact there are B Cards but no such things as B Licenses, there was therefore no proof of the falsity of Pickett's grand jury testimony; (6) in order to establish defendant's guilt, the prosecution had to establish that he lied as to each of the six named electricians. Because the alleged payments by the five other than Washington were outside the statute of limitations, the government cannot establish false declarations within the statute of limitations.

In reviewing the sufficiency of the evidence, we must sustain the verdict of the jury "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Applying this standard, we hold that the evidence of Picketts' guilt of Count Two is sufficient for the conviction to be sustained.

Count Two of the indictment of Picketts charged all of the elements of the offense. Paragraph 3 charged that "[i]t was a matter material to this investigation for the Special January 1979 Grand Jury to know whether OLIVER W. PICKETTE [sic], defendant herein, had solicited or accepted money from electricians in connection with their employment at the Chicago Housing Authority." Paragraph 4 charged that Picketts appeared under oath before the grand jury and made false and material declarations which were listed in detail. From the indictment handed down by the grand jury on the substantive count and the

grand jury transcript admitted into evidence, it was proved clearly that the grand jury was investigating whether defendant Picketts solicited and accepted money from CHA electricians. The parties stipulated as to events before the grand jury. Defendants did not challenge at trial the legality of the grand jury and have, accordingly, raised no issue as to its legality.

Defendant next contends that the record contains no evidence of the materiality of the false declarations made by Picketts. Under 18 U.S.C. § 1623, materiality is defined as a statement's "effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." *United States* v. *Devitt,* 499 F.2d 135, 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975). The determination of materiality is an essential element of the crime and is a question of law for the court to decide. *United States* v. *Watson,* 623 F.2d 1198 (7th Cir. 1980).

Defendant argues that the only permissible method for establishing materiality is for the prosecution to call the foreperson or other member of the grand jury to testify as to the scope of the grand jury investigation, so that the court can determine whether the declarations alleged to be false were material to the grand jury investigation. Although that is a common method of proving materiality, it is not the only permissible method. Testimony by the prosecuting attorney who worked with the grand jury or introduction of the transcript of the grand jury proceedings are also permissible and common methods of proving materiality. *United States* v. *Berardi,* 629 F.2d 723, 727 (2d Cir.), *cert. denied,* 101 S.Ct. 534 (1980); *United States* v. *Bell,* 623 F.2d 1132, 1135 (5th Cir. 1980). The court in *Bell* decided that materiality could be proved by looking at the indictments which the grand jury issued in order to determine the scope of its investigation. *Id.* In the

instant action, the government introduced the grand jury transcript at trial. The transcript shows that immediately prior to the questioning of Picketts, he was advised by the prosecutor that the grand jury was investigating whether Picketts had solicited and received money from CHA electricians. The Count One indictment demonstrates further that these solicitations and payments were a subject of the grand jury investigation. We find that materiality of the declarations of Picketts to the grand jury was proved clearly.

Picketts asserts that the prosecution failed to prove another element of the crime, that his declaration was made under oath. We find no merit in this argument. The grand jury transcript of Picketts' testimony begins as follows: "OLIVER WENDELL PICKETTS having been first duly sworn by the Foreman to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows: . . ." In *United States* v. *Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), this court found the introduction of a grand jury transcript and the testimony of a Justice Department attorney who had been present at the grand jury proceedings to be sufficient to show that testimony was under oath. Although we believe it would be better practice for someone present at the grand jury proceedings to testify to the giving of an oath, we find that the transcript of defendant's grand jury testimony was sufficient to prove that he testified under oath.

Picketts argues that the indictment charged that he solicited and accepted money "in return for the defendant's recommendation that the electricians receive a B License . . .," but that this charge was not proved because there exist B Cards but not B Licenses. This court has defined the test of whether a variance between indictment and proof require reversal, as follows:

> In determining the sufficiency of an indictment, "minor or technical deficiencies" no longer require reversal; courts look instead to whether the substantial rights of the defendant have been prejudiced by the omission or error. The same standards apply in determining whether a variance between the charge in the indictment and the proof at trial requires reversal. An indictment is sufficient if (1) it states the essential facts underlying each element of the offense charged, (2) it informs the defendant of the offense charged with sufficient clarity to enable him to prepare his defense, and (3) it provides adequate protection against a second prosecution for the same offense. If the language of the indictment meets these requirements, then a slight variance between the indictment and the proof at trial is considered nonprejudicial.

United States v. *Atchison*, 524 F.2d 367, 370 (7th Cir. 1975) (citations omitted). We find the variance between B License and B Card to be nonprejudicial under this standard. As to the denials by Picketts regarding solicitations of and payments by all the electricians other than Washington, the record clearly contains sufficient evidence of the defendant's guilt.

Regarding Washington, the position is different because the proof fails to show that Washington's payments were made to receive a recommendation for either a B License or a B Card. If the phrase in the indictment "in return for the defendant's recommendation that the electricians receive a B License from Local 134 of the International Brotherhood of Electrical Workers," is treated as surplusage as to Washington, the indictment still charged Picketts with falsely testifying about whether he had accepted or solicited $100 from Washington "in connection with Washington's job as an electrician at the Chicago Housing Authority; . . ." There is sufficient evidence in the record to prove this charge.

Even if proof failed as to Washington on Count Two, that would not render the conviction invalid. All the government was required to prove was that Picketts testified falsely *one or more* times before the grand jury. Defendant challenges the sufficiency of the evidence regarding several of the electricians. It is not the function of this court to reweigh the evidence or to substitute its judgment for that of the trier of fact. As indicated above, the evidence was clearly sufficient to prove defendant's guilt on Count Two.

Defendant argues that the government failed to prove the allegations in paragraphs 1 and 2 of Count Two, which read as follows:

> 1. On May 31, 1979, at Chicago, in the Northern District of Illinois, Eastern Division, the Special January 1979 Grand Jury was sitting as a duly impaneled and sworn grand jury.
>
> 2. At the time and place aforesaid, the Special January 1979 Grand Jury was investigating whether OLIVER W. PICKETTE, [sic], defendant herein, was soliciting and accepting money from electricians working under his supervision at the Chicago Housing Authority, in violation of Title 18, United States Code, Section 1962.

The elements of the offense were all charged in the succeeding paragraphs of the count and, as shown above, were all proved. The language of an indictment that goes beyond alleging the elements of the statute is mere surplusage which need not be proven. *United States* v. *Jordan*, 626 F.2d 928 (D.C. Cir. 1980); *United States* v. *Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

Contrary to the defendant's argument, the prosecution was not barred by the statute of limitations from showing the falsity of Picketts' declarations regarding acts which

occurred more than five years before the date of the indictment. A grand jury may ask questions about events outside of the statute of limitations, *United States* v. *Nickels,* 502 F.2d 1173 (7th Cir. 1974), *cert. denied,* 426 U.S. 911 (1976), or about acts which otherwise would not lead to indictments. *United States* v. *Jacobs,* 543 F.2d 18 (7th Cir. 1976), *cert. denied,* 431 U.S. 929 (1977). Defendant relies upon *United States* v. *Reed,* No. LR-CR-80-67 (E.D. Ark., W.Div., Sept. 10, 1980) to support his argument. The *Reed* court did not hold that under no circumstances could a person be indicted for making a false statement to a grand jury about events for which there could be no valid charge because of the running of the statute of limitations. Rather the *Reed* court ruled that due process barred a § 1623 prosecution "founded on accusations which are based on transactions of 8 to 10 years ago *when no material records, inculpatory or exculpatory, are available and the accused's primary witnesses have died* . . . ." (Emphasis added.) *Id.,* Order at 5. The facts in the instant case are not similar to those in *Reed* and, therefore, the prosecution in this action is not barred merely because the false statements concerned events outside of the statute of limitations.

Defendant claims that there was an abuse of the grand jury process and that the grand jury violated his Fifth Amendment rights. The argument is not made clearly but apparently is that once the grand jury had heard testimony which the assistant U.S. Attorney believed was sufficient to merit his recommendation that defendant be indicted for illegal acts, it was then improper for defendant to be called before the grand jury to be asked if he committed those acts. We find no merit in this argument.

There is nothing improper about a grand jury's calling the target of its investigation to testify. *United States* v. *Mandujano,* 425 U.S. 564, 583-84 (1976). The defendant

could properly have invoked his Fifth Amendment right not to testify, but he chose not to do so. Once he waived his right against self-incrimination, defendant was required to testify truthfully or to risk prosecution for not doing so. The Supreme Court has indicated that "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States,* 396 U.S. 64, 72 (1969), *quoted in Mandujano,* 425 U.S. at 585 (Justice Brennan, concurring). *Accord, United States* v. *Edelson,* 581 F.2d 1290, 1293 (7th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979).[3]

Defendant asserts that the court's instruction regarding his good character defense, made over objection by the defense counsel,[4] constitutes error requiring reversal of the conviction.

The instruction reads as follows:

> The circumstances may be such that evidence of good character may alone create a reasonable doubt of the defendant's guilt, although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all of the evidence, including the evidence of good character, is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment.

This court has previously approved this same instruction as a proper and adequate statement of applicable law.

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[3] Nor do we find any merit in defendant's related argument regarding the "exculpatory no" doctrine.

[4] Although defense counsel objected to the instruction, the grounds for her objection do not clearly appear in the record. Because we find no error in the instruction, we do not decide whether the objection at trial was sufficiently concrete to preserve the issue on appeal.

United States v. *Ming*, 466 F.2d 1000, 1007 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972). This instruction does not suffer the defect found to require reversal in *United States* v. *Leigh*, 513 F.2d 784 (5th Cir. 1975). The instruction in *Leigh* differed from the instruction before us in that it omitted in the last sentence the words "including the evidence of good character." The *Leigh* court indicated that "the jury could easily have formed the impression that reputation evidence could only be used to tip the scales in defendant's favor if the case was otherwise close . . . ." 513 F.2d at 786. The instruction in the present case clearly indicated that the jury was to weigh "all the evidence, including the evidence of good character" to determine guilt beyond a reasonable doubt.[5] Accordingly, we find no error in the giving of this instruction.

Therefore, we affirm the district court's judgment of conviction.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] Several decisions of the Fifth Circuit have found no error in instructions on character which advised the jury to consider reputation evidence in the same manner it considered all other evidence. *United States* v. *Gorel*, 622 F.2d 100, 105 (5th Cir. 1979); *United States* v. *Callahan*, 588 F.2d 1078, 1084-86 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979). In *United States* v. *Lange*, 528 F.2d 1280 (5th Cir. 1976), and *United States* v. *Furr*, 528 F.2d 578 (5th Cir. 1976), the Fifth Circuit found no error in instructions on good character identical in pertinent respect to the instruction in the present case. Without mentioning *Lange* or *Furr*, the court found the same instruction invalid under *Leigh*, in *United States* v. *Harris*, 533 F.2d 306 (5th Cir. 1976). The *Harris* decision was criticized in *Callahan*, 588 F.2d at 1086, and apparently has not been followed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 17, 1981

Before

Hon. Thomas E. Fairchild, Senior Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 80-2418 vs.

OLIVER W. PICKETTS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 80-CR-131

Thomas R. McMillen, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the defendant-appellant, all members of the original panel having voted to DENY a rehearing, and no judge in regular active service having requested a vote on the *en banc* suggestion, accordingly

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.